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IN THE

Supreme Court of the United States

October Term, 1965

No. 717

KATHLEEN MOLNES WALSTON,
Petitioner,

v.

THELMA LAMBERTSEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on August 5, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in Appendix B hereto, *infra*, p. App. 1, is reported in 1964 AMC 1543. The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix C hereto, *infra*, p. App. 6, is reported in 349 F.2d 660 (1965).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 5, 1965. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the sinking or other failure of a vessel under circumstances and conditions which the vessel must reasonably anticipate and overcome raises a presumption of unseaworthiness and negligence which must be rebutted.

2. Whether, without the statutory requirement and independent of Coast Guard regulations, a vessel is seaworthy and the owner free of negligence, unless it has at least one lifeboat suitably equipped.

STATUTES INVOLVED

The statutory provisions involved are 46 U.S.C., Section 183 (a). This is printed in Appendix A, *infra*, p. App. 1.

STATEMENT

This is a limitation of liability proceeding under the terms and provisions of 46 U.S.C., Sections 183-189, arising out of the loss of the fishing vessel, *Frank L III*, on February 21, 1959, off the coast of Washington. Following the filing of the petition for exoneration from or limitation of liability, an affidavit of value and a cost bond, an order for a monition and injunction was entered and a monition was issued.

The sole claim filed is that of the claimant herein, Kathleen Molnes Walston, widow of Phillip R. Molnes, a deceased member of the crew of the vessel.

In the agreed Pre-Trial Order the following facts are admitted by all parties:

The claimant is the duly acting administratrix of his estate and, until his demise, constituted with her husband a marital community residing in Grays Harbor County, Washington.

On February 21, 1959, the petitioner and her husband were the owners of the fishing vessel, *Frank L III*, official number 270684. On that date, the late Phillip R. Molnes was a resident of Grays Harbor County, Washington, and was a crew member of the *Frank L III*. The said fishing vessel, *Frank L III*, was of gross tonnage of 13 tons and net tonnage of 12 tons. The vessel was 38.8 feet long, 14 feet in breadth and 3.4 feet in depth in her hull, built of wood in 1955 by Grandy Boat Company, Seattle, Washington.

Prior to the voyage in question, the late Frank Lambertsen knew that the vessel was engaged in crabbing operations. The master of the vessel on February 21, 1959, was Kenneth Ashby of Westport, Washington, the son-in-law of Frank Lambertsen. Prior to the trip in issue, a crab tank was added to the deck of the *Frank L III* which added some gross weight to the vessel. The task of picking up and relocating crab pots necessitated the slowing down of the vessel's engine. The addition of gross weight to the vessel results in a reduction of freeboard.

On the morning of February 21, 1959, the vessel, having on board her master and crew, departed from Westport to the waters outside the bar off the Washington coast for the purpose of conducting crab fishing operations. The voyage terminated on February 21, 1959, when she sank in some twenty-three fathoms, resulting in the loss of the lives of her master and crewmen, the loss of the vessel, her cargo, equipment and furnishings. At the time of the casualty, a light breeze was blowing from the northeast, seas were calm, weather was clear, and the visibility was about six miles. At the time of the casualty, the *Frank L III* was not carrying a life raft.

All of the above facts are included as admitted facts in the Pre-Trial Order. In addition, however, certain facts emerged clear and undisputed at the trial. These are as follows:

The *Frank L III* was designed primarily as a sport fishing boat, but was also to be used for crabbing. On the day in question, some time before the casualty, the boat was picking up crab pots. These crab pots weigh approximately one hundred pounds apiece. These pots were piled onto the boat topside. Any crabs taken from the pots were put in the crab tank and the crabs were covered with water in the crab tank. The owner, Frank Lambertsen, knew the condition of the vessel on the day in question and knew that the vessel was engaged in crabbing operations. He further knew of the usual course and custom of crabbing operations. He also knew of the size of the loads that the boat carried, and he knew of occasions when his boat was overloaded.

He likewise knew that there was no life raft on the boat at the time of the casualty, as did Mrs. Lambertsen, and the record indicates that the body of the claimant's decedent was found floating in the water.

At all times the operation, control and maintenance of the vessel in question was by Frank Lambertsen or his servants or employees, and the voyage of February 21, 1959, was undertaken by servants or employees of Frank Lambertsen with his full knowledge.

The vessel was never raised from where it sank.

The United States District Court, on January 16, 1964, rendered its oral opinion, granting the Petition for Exoneration and Limitation and denying claimant's claim.

Findings of Fact, Conclusions of Law and Decree were entered by the said Court on the 19th day of February, 1964.

The Court below affirmed the decree of the District Court upon the view of the law that the presumption of unseaworthiness and negligence which has been held to arise in such cases is indulged only when the claimant is able to establish that the vessel was unseaworthy or negligently equipped at the time it departed on its last voyage. The Court below made no comment upon whether or not the absence of a lifeboat constituted negligence or unseaworthiness, but merely held it to be conjectural as to whether the decedent's life would have been saved if a lifeboat had been available—this in face of the fact that decedent's body was found—floating, and in face of the law that a finding of negligence or unseaworthiness raises a presumption of proximate cause.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Court below in the instant case are directly in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Walker v. Harris,* 335 F.2d 185 (1964); cert. den. ..... U. S. ....., 85 S. Ct. 326, 13 L.Ed.2d 342.

In the instant case, the Ninth Circuit Court held that the presumption of unseaworthiness is to be indulged only when a claimant has been able to establish that the vessel was unseaworthy at the time it departed on its last voyage. In addition, the Court held inapplicable the doctrine of *res ipsa loquitur* with respect to negligence and held that, under the evidence, even where the vessel went down in weather clearly to be expected, this was insufficient to support a finding of negligence.

Secondly, the Court in the instant case found that, although the vessel was not equipped with a lifeboat, an inference that the decedent's life would have been saved if a lifeboat had been available was conjectural.

To the contrary, the Fifth Circuit Court of Appeals in *Walker v. Harris,* 335 F.2d 185, cert. den. ..... U.S. ....., 85 S. Ct. 326, 13 L.Ed.2d 342 (1964), held:

> "This analysis brings us, therefore, to the application of the familiar doctrine, so often invoked where vessels sink in calm waters, that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of unseaworthiness. Although not articulated in such terms, it is a sort of seagoing *res ipsa loquitur.* Once it is assumed (or judicially held) that the

vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here."

The Fifth Circuit likewise held that:

". . . with or without statutory requirement and wholly independent of Coast Guard regulations, no vessel putting to sea in the open waters of the Gulf of Mexico on a voyage which will put the ship as much as 12 hours from shore in December is seaworthy unless it has at least one lifeboat suitably equipped."

". . . This represents no intrusion into the legislative domain and certainly not in maritime matters where most of the controlling law has been and still is judge-made. Far from an innovation, failure of an admiralty court at this day and time to recognize the imperative necessity for a suitable lifeboat on an ocean-going vessel would put it completely out of step with the times. Indeed, a court would be at least 75 years behind the times."

The Fifth Circuit went on to find as a matter of law that there was unseaworthiness of tug and lifeboat and further held as a matter of law under the circumstances present, (which parallel those in the instant case almost completely), and that the unseaworthiness of the tug and the lifeboat was occasioned in whole or in part from the negligence of the ship owner. The Fifth Circuit recognized the problem of whether the death action would be under the Jones Act, the Death on the High Seas Act, or th state death Act, but eliminated that problem by holding there to be negligence as a matter of law. How-

ever, even if negligence were not held as a matter of law, certainly the presumption of negligence should have been applied under the *Walker v. Harris* case. The Fifth Circuit therefore reversed the United States District Court and held as a matter of law that the petition for exoneration and limitation of liability must be set aside.

It should be noted that the facts of the cases are extremely similar and that the two circuits appear to be in an irreconcilable conflict. This matter has, therefore, been in dispute and will remain so until settled by the Supreme Court.

2. Clearly, the question presented is of importance in the administration of the admiralty jurisdiction of the United States Courts. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in many cases involving substantial rights and liabilities of dependents of decedents and involving the interests of vessel owners. In addition, reversal by this court of the Ninth Circuit opinion and the adoption of the view of the Fifth Circuit will go a long way to aid in the safety provisions and practices utilized in small boats which go to sea.

3. The decision of the Court below is believed to be erroneous and the conflicting decision of the Fifth Circuit Court of Appeals in *Walker v. Harris, supra,* is believed to be correct. Moreover, the decision in the instant case below probably conflicts with applicable views of this Court. It should be noted that in the *Walker v. Harris* case, a petition for certiorari to the United States Supreme Court was filed and denied. It

should further be noted that in *Sabine Towing Company v. Brennan*, 72 F.2d 490, 1934 A.M.C. 1122 (Fifth Circuit), a petition for certiorari was also attempted, and it was denied at 293 U.S. 611, 79 L.Ed. 701, 55 S. Ct. 141, 1934 A.M.C. 1414. In the *Sabine Towing Company* case, *supra*, once again the Court applied the presumption of unseaworthiness where the tug sank in weather which was not unusual for the season, and the Court stated that the duty was upon the owner to rebut that presumption. In that case, although no positive evidence of the cause of the loss was demonstrated, the owner was held not entitled to exoneration.

This Court has not, however, specifically, ruled upon this question and it is felt appropriate that it do so to settle the important questions which are raised.

4. In addition, this petition should be granted because of the erroneous nature of the decision below and the Supreme Court's expressed desire and interest in correcting decisions of the Courts of Appeals where the decision is unjust and unreasonable or plainly wrong. The decision below not only represents a gross miscarriage of justice, but constitutes an erosion of a legal principle in the maritime law which this Court has not previously countenanced, nor, it is believed, will the Court countenance it now.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

November 2, 1965

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APPENDIX A

Title 46 U.S.C. Section 183 states, in pertinent part, as follows:

> "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

APPENDIX B

The purpose of the Congressional Acts providing for exoneration and limitation of liability as to seagoing vessels is to protect owners against claims predicated upon negligence or unseaworthiness as to which the owner has neither knowledge nor privity. In a proceeding such as this, then, the ultimate question is whether or not the casualty resulted from an unseaworthy condition or negligent conduct in which the owner participated or of which he had knowledge.

The loss of the *Frank L III* is clearly one of those, unfortunately, all too common mysteries of the sea. The actual and precise manner and cause of the sinking is a matter largely if not entirely of speculation. On the evidence before me, there is not a scintilla of evidence to establish negligence on the part of or known to the

petitioners Lambertsen nor of the master or crew of the vessel.

I find and hold that negligence has not been shown in any particular whatever, either to have existed or to have been known to or participated in by the petitioners Lambertsen, either husband or wife. The *Frank L III* was built for the express purpose of performing the functions in which it was used; namely, as a combination sports fishing vessel for use in the particular area where it was employed, namely, in the Westport area, and also as a crab fishing boat in the same area. This is undisputed.

The vessel was built by one of the best-known boat builders in the Northwest, highly competent and experienced, and the evidence shows that the builder took special precautions to make the vessel suitable for the combined purposes indicated. The adding of the "live tank" to the vessel was at the instance of a competent and long-experienced skipper, accomplished by a construction firm of good repute, and there is not the slightest indication that it was improper or negligently done in any particular.

I find and hold there was neither negligence nor unseaworthiness indicated by the addition of the "live tank." This type of equipment is not uncommon in the Westport area for vessels employed both for sports fishing and crab fishing. It might well be doubted whether vessels in that area could operate successfully or economically if they could not do both the sports fishing

and the crab fishing or some other type of commercial fishing during the off season for sports fishing. However that may be, it is well established in my opinion by this evidence that there was neither negligence, incompetence, nor other defect in the construction of this vessel nor any unseaworthy condition in it at the time of departure on its last voyage. In any case, it is clear that neither Mr. Lambertsen nor Mrs. Lambertsen had the slightest familiarity with either marine construction or procedures or precautions required in crab fishing. They made no effort to interfere in the construction, remodeling, or use and navigation of the vessel, and sought and followed competent, experienced people in all particulars suggested to them.

Under the law pertaining to limitation or exoneration, an owner is not required to know the stern from the bow of his ship. He has no obligation to undertake a course of study about navigation, the mysteries of the sea and the like. Within the law of limitation an owner may be a drygoods merchant in the Midwest and rely upon competent people to build his ship, to equip it and to run it and do that which they request and suggest to him. Even if their suggestions turn out to be unwise, negligent or result in unseaworthiness, the owner will not be precluded from limitation in or exoneration from liability for a casualty resulting from unseaworthiness or negligence outside the knowledge or privity of the owner.

It is a long settled rule that if a vessel in calm weather and sea goes down without apparent cause or explana-

tion, it is presumed that the sinking resulted from unseaworthiness. However, my analysis of the cited decisions indicates that in each of those cases where the presumption principle was applied to fasten liability, or to put it more correctly, to deny limitation or exoneration, there was some evidence indicating either negligence or unseaworthiness in one or more particular respects as to which the owner failed to establish his lack of knowledge or privity. The showing of negligence or an unseaworthy condition gave the presumption something particular upon which to operate; namely, the presumption that the particular negligence or unseaworthiness indicated by the evidence was the proximate cause of the loss. However this may be, I am thoroughly satisfied that the evidence in the present case clearly shows that if there was any inadequacy in either the construction of the vessel, its equipment, or the uses to which they were put, I find there was not, but if there was, they were not of a character or extent constituting unseaworthiness. Considering the particular uses and purposes for which this particular vessel, the *Frank L III*, was intended, I find that it was entirely seaworthy in all particulars and each of the contentions otherwise is found without merit.

Finally, if it be thought that in some particular or other my findings as stated are incorrect, I think it is established beyond reasonable doubt that neither Mr. Lambertsen nor Mrs. Lambertsen had the slightest knowledge, privity, or participation in creating or permitting any condition of unseaworthiness which might

be thought to have existed in the vessel. On the contrary, the evidence shows that each and both of them, and particularly Mr. Lambertsen as the manager of the community business, was especially ready and willing to do all that competent advice and authority suggested should be done to make the vessel and its operation as safe as such operation can be.

Despite all of the latter day developments in naval architecture, construction and equipment and all of the safety precautions we now have which were unheard of just a few years ago, the perils of the deep for those who "go down to the sea in ships" remain in great number and variety, and in all likelihood will never be fully removed.

Under the circumstances shown by the evidence it is clear that the petition should be granted on both branches, and it is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KATHLEEN MOLNES WALSTON, *Appellant,* v. THELMA LAMBERTSEN, *Appellee.*	No. 19253

[August 5, 1965]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Before: MERRILL, DUNIWAY and ELY, *Circuit Judges*

ELY, Circuit Judge:

Appellee and her husband were the owners of a seagoing vessel known as *Frank L III*. They had caused the vessel to be constructed in 1955, and it was built in the knowledge that it would be used for two purposes, namely, sports fishing and crab fishing. It was built of wood, had a gross tonnage of thirteen tons and a net tonnage of twelve tons, and its dimensions were 38.8 feet in length, 14 feet in width, and 3.4 feet depth in hull. On February 21, 1959, the vessel sank off the coast of the State of Washington. She was engaged in crab fishing operations at the time, and her master and the only two crewmen were drowned. Appellant, the widow of one of the crewmen, instituted an action for damages in a Washington state court alleging that the loss of her

husband's life resulted from unseaworthiness of the vessel and from negligence in its maintenance, construction and operation.

Appellee, whose husband and co-owner of the vessel died following the tragedy at sea, filed a petition in the court below seeking, under the provisions of Sections 183-189 of Title 46, U.S.C. (1958), to exonerate herself from liability or to limit the extent of her liability. Issue was joined, trial was had, and a judgment exonerating the petitioner from liability was entered upon, and based upon, the trial court's conclusions of law as follows:

"CONCLUSIONS OF LAW

"1. There is no evidence to establish negligence on the part of the petitioners Lambertsen nor of the master or crew of the vessel *Frank L III.*

"2. There is no evidence to establish unseaworthiness of the vessel at or prior to the time of the loss.

"3. There is no evidence of any negligence, incompetence or other defect in the planning and construction of the vessel or in any changes subsequent thereto to establish that it was unseaworthy at the time of departure on its last voyage.

"4. There is no presumption of unseaworthiness of the vessel since there is no evidence indicating either negligence or unseaworthiness in one or more particulars at or prior to the time of the loss.

"5. Neither the petitioner, Thelma Lambertsen, nor her deceased husband, Frank L. Lambertsen, had the slightest privity or knowledge of any condition of unseaworthiness or negligence which might be alleged to have existed with respect to the vessel and which might be alleged to have been the proximate cause of the loss."

Appellant seriously and ably contends that the trial court's conclusions are not supported by the evidence, but we, convinced to the contrary, must affirm.

The actual cause of the sinking of the vessel could not be proved. It disappeared on a day when only a light breeze was blowing and when the seas were calm, the weather was clear, and the visibility was about six miles. When last seen by other fishermen on other boats in the area of their common crabbing operations, one of the fishermen observed that there was "nothing out of line" as to the loading of the vessel and that it "was being maneuvered in its normal manner." This fisherman, the master of his own vessel, observed that the *Frank L III* "was going along just like a duck, easy, had all the time of the world, it appeared." The master of another crab fishing boat, produced as a witness by the appellant, when asked whether or not on the day of the sinking he had noticed the *Frank L III* "heading up to any extent while picking up pots," replied, "Absolutely not. If I would have, we would have went over there."

Appellant endeavored to support her claim by proving that for the *Frank L III's* use as a crab fishing vessel, a live crab tank, designed to contain 5,000 pounds of crabs, had been installed on the deck of the vessel and had adversely affected its seagoing stability. It was urged, in effect, that the trial court might infer that the vessel's sinking resulted from negligence in the alteration, by addition, in the ship's equipment and that the additional weight of the crab tank with an undetermined amount of crabs, plus the weight of crab pots, created

an unseaworthy condition which proximately caused the capsizing and sinking of the vessel. The appellant contends that the district court erroneously failed to apply the doctrine of *res ipsa loquitur* to her advantage. Our court has held that if a claimant establishes that a vessel is unseaworthy, the trial court may presume that the unseaworthiness was the proximate cause of the sinking, otherwise unexplained, of a vessel in calm seas. *Admiral Towing Co. v. Woolen,* 290 F.2d 641, 1961 Am. Mar. Cas. 2333 (9th Cir.). The appellant relies heavily upon this decision, and she also directs our attention to *Roth v. Bird,* 239 F.2d 257, 1957 Am. Mar. Cas. 112 (5th Cir. 1956); *The Cleveco,* 154 F.2d 605, 1946 Am. Mar. Cas. 933 (6th Cir.); *Sabine Towing Co. v. Brennan,* 72 F.2d 490, 1934 Am. Mar. Cas. 1122 (5th Cir.), *cert. denied,* 293 U.S. 611, 79 L.Ed. 701, 55 Sup.Ct. 141, 1934 Am. Mar. Cas. 1414; and *Petition of Midwest Towing Co.,* 203 F.Supp. 727, 1962 Am. Mar. Cas. 2438 (E. D. Ill.), *aff'd sub nom. Midwest Towing Co. v. Anderson,* 317 F.2d 270, 1963 Am. Mar. Cas. 2376 (7th Cir.). A review of the opinions in these cases and all others which might seem somewhat analogous to the case at bar makes it clear that the presumption which appellant would apply has been indulged only when the claimant has been able to establish to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage. The sea itself contains many hazards,[1] and an inference of

1. The existence of one hazard is shown by the following testimony:

"Q. Mr. Stedman, from your experience in the area where this fishing was going on at the time, what is the situation with respect to the general situation with respect to debris in the water or dead-

liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel.[2]

---

heads or whatever types of things are in the water as foreign material?

"A. Well, this is a question that has been asked everybody, about deadheads, or did you see any deadheads at this particular time, but driftwood and deadheads are a common occurrence. Every day—there isn't one day, not one day out of the year that you can go out of Grays Harbor and not have quite a number of deadheads.

"Q. What is a deadhead?

"A. It's a log or even a piece of wood that sinks partially under the water and partially out of the water. When there is a little chop, they are very hard to see.

"Q. Have you had any experience or encounters with that type of thing?

"A. Yes. With the vessel that we are discussing, I holed it one time.

"Q. You mean by that you put a hole in it?

"A. Yes.

"Q. Have you had any other experiences with this type of debris in that area?

"A. Yes, I had an experience with my own vessel that I have now, but I have been very fortunate; I have hit them right, so I haven't done any harm except to my wheel. I had to have my wheel straightened out.

"THE COURT: Are these experiences in the general vicinity of where the fishing was, the crabbing was going on the day of this accident?

"THE WITNESS: Yes. Where this North Whistler was that the gear was near is a tide rip that comes from the harbor, that runs around the harbor, and that general area is quite noted for sticks and deadheads. We had a boat this summer that was busted wide open there, two, in fact, but one of whom was very lucky. They got the Coast Guard boat on each side and managed to save it."

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2. The *Frank L. III* was not equipped with a life boat, but it would hardly be reasonable to infer that the absence of such equipment proximately contributed to the sinking of the vessel. The body of appellant's

In the admiralty proceeding in which a shipowner seeks to exonerate himself from liability or to limit his liability, the burden of proving negligence or unseaworthiness rests upon the claimant. *Lieberman v. Matson Navigation Co.*, 300 F.2d 661, 1962 Am. Mar. Cas. 1281 (9th Cir.); *Ramos v. Matson Navigation Co.*, 316 F.2d 128, 1963 Am. Mar. Cas. 1134 (9th Cir.). Findings of lack of negligence and of seaworthiness may be upheld as not clearly erroneous either because affirmative evidence supports the findings or because sufficient evidence to the contrary has not been presented by the one upon whom rests the burden of proof. *Ramos v. Matson Navigation Co., supra.* In our review of the evidence, we have noted that the history of the construction of the *Frank L. III* and its alteration for crab fishing purposes was fully developed. It was shown that in the construction stage, it was planned that the vessel be made adequate for both sports fishing and crab fishing purposes. The trial judge, in announcing his conclusion, remarked:

> "The vessel was built by one of the best-known boat builders in the Northwest, highly competent and experienced, and the evidence shows that the builder took special precautions to make the vessel suitable for the combined purposes indicated. The adding of the 'live tank' to the vessel was at the instance of

intestate, when discovered, was floating in a life jacket. In the absence of more proof than was available to appellant, to infer that her intestate's life would have been saved if a life boat or a life raft had been available would be to indulge in mere conjecture. *The Princess Sophia*, 61 F.2d 339, 1932 Am. Mar. Cas. 1652 (9th Cir.). See *Powers v. New York Central Railroad Co.*, 251 F.2d 813, 1958 Am. Mar. Cas. 614 (2d Cir.) and *Wilhelm Sea Foods Inc. v. Moore*, 328 F.2d 868, 1964 Am. Mar. Cas. 2264 (5th Cir.), *affirming per curiam, Moore v. The O/S Fram*, 226 F.Supp. 816, 1964 Am. Mar. Cas. 2265 (S. D. Tex. 1963), wherein the evidence justified findings that lack of adequate equipment bore a direct causal relationship to the deaths of the seamen.

> a competent and long-experienced skipper, accomplished by a construction firm of good repute, and there is not the slightest indication that it was improper or negligently done in any particular."

There was evidence that the boat, while engaged in prior crab fishing operations and when much more heavily loaded than it would appear to have been at the time of its loss, safely rode out heavy seas. Considering the whole body of testimony, we are of the opinion that the trial court was fully justified in arriving at the determinations which are fatal to the contentions of appellant.

In *Ramos v. Matson Navigation Co., supra,* Judge Duniway, for our court, wrote, at page 131, 1963 Am. Mar. Cas. at 1137,

> "We are committed to the proposition that a finding as to negligence, or as to unseaworthiness, is one of fact, not to be upset by us unless clearly erroneous. (See, as to negligence: *Pacific Tow Boat Co. v. States Marine Corp.*, 9 Cir., 1960, 276 F.2d 745; *Albina Engine & Mach. Works v. American Mail Line, Ltd.*, 9 Cir. 1959, 263 F.2d 311; *Amerocean S.S. Co. v. Copp*, 9 Cir. 1957, 245 F.2d 291; and as to unseaworthiness: *Admiral Towing Co. v. Woolen*, 9 Cir. 1961, 290 F.2d. 641.)"

Here, we have pointed to evidence which together with, if not apart from, other persuasive testimony which appears in the record was adequate to support affirmatively the conclusions of absence of the shipowners' negligence and absence of an unseaworthy condition in the vessel.

In the court below, the thrust of appellant's case was to the proposition that the *Frank L. III,* was unsea-

worthy. As we analyze the evidence, it was entirely insufficient to support a finding of negligence, had such a finding been made. It is only upon the basis of negligence that a claim arising from a seaman's death within territorial waters can rest. *Lindgren v. United States*, 281 U.S. 38, 74 L.Ed. 686, 50 Sup.Ct. 207, 1930 Am. Mar. Cas. 399; *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 13 L.Ed.2d 199, 85 Sup.Ct. 308, 1965 Am. Mar. Cas. 1 (1964). In our court, the appellant urges for the first time that her claim be evaluated in the light of the so-called Death on the High Seas Act. 46 U.S.C. § 761 *et seq*. Suffice it to say that liability under that Act must also rest upon adequate proof of negligence or unseaworthiness.[3]

Our conclusion that the appellee was properly exonerated from liability renders it unnecessary to consider the question as to whether or not her evidence supported the district court's conclusion that neither she nor her husband was privy to or knowledgeable of any alleged negligence or condition of unseaworthiness.

Affirmed.

3. Appellant did not prove that the vessel sank beyond a marine league from shore and thus without the territorial waters of the United States. Moreover, while the Death on the High Seas Act confers jurisdiction "in the district courts of the United States, in admiralty," and prescribes a limitation period of two years, the appellant instituted her suit in the state court almost twenty-eight months after the vessel sank.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 717

KATHLEEN MOLNES WALSTON,
Petitioner,

v.

THELMA LAMBERTSEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ADDITIONAL STATEMENT OF THE CASE

The respondent feels that it is proper that this Court have before it certain additional facts which were provided the Court of Appeals in the respondent's brief in that Court, as follows:

One of the last witnesses to see the *Frank L III* afloat noted that she had only a few pots aboard and that she was not heeling to any extent while picking up these pots (Vol. 2, Tr. 32). The previous skipper of the boat had noted that it would not heel over while picking up crab pots and that, in fact, the line would

break before any list would be put on the vessel (Vol. 2, Tr. 54, 55). While some pots were seen aboard the vessel topside, the vessel was not fully loaded with pots and there was no way of telling how many pots were aboard (Vol. 2, Tr. 72, 76). While there was no evidence, but only an inference, that the *Frank L III* had any crabs in its live tank at all, one of the nearest boats described its own day's catch as "next to nothing" (Vol. 2, Tr. 180, 183).

The owner, Frank Lambertsen, was not present when it left the dock on the morning of the casualty (Vol. 2, Tr. 210). He did not claim or purport to know anything about crabbing or the construction of boats for that purpose (Vol. 2, Tr. 169, 209).

ARGUMENT

A. *Walker v. Harris* Is Not a "Fair Weather-Presumption of Unseaworthiness" Case

The petitioner contends that *Walker v. Harris*, 335 F.2d 185 (1964), cert. den. ..... U.S. ....., 85 S.Ct. 326, 13 L.Ed.2d 342, is in conflict with the Court of Appeals decision in the case at bar since the former applied a rule of a presumption of unseaworthiness when a vessel disappears or sinks in calm waters, whereas the latter did not do so. In the *Walker* case, *supra*, the Court only briefly referred to what it called a "familiar doctrine" arising when vessels sink in calm waters. We repeat that portion of the Court's opinion, which was also included in appellant's brief, but we add thereto the one footnote applicable to the excerpt:

"(6) This analysis brings us, therefore, to the application of the familiar doctrine, so often invoked where vessels sink in calm waters,[15] that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here."

"15. *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 118, nn. 3, 4, 1957 AMC 1946, collects the cases."

The case referred to in the above footnote arose in the Fifth Circuit but dealt not with a death or injury, but a hull claim under an American Institute Time Hull Policy. In considering the presumptions which arise both from the commencement of a leak while the vessel is in calm waters and any counter-presumptions which arise as to whether the loss comes within the perils covered by the policy, the Court referred to numerous cases. We have carefully reviewed each of these cases and find that they all were concerned with hull claims under marine insurance policies and the various interpretations of the latter. The Court then reviews the Adventures and Perils Clause, the provisions of a Time Policy, the problem of latent defects under a marine insurance policy, and the Inchmaree clause. To graphic-

ally demonstrate the Court's treatment of the matter as an interpretation of a marine insurance policy, we quote the following:

> "Consequently, this is not the simple case in which a loss due to unseaworthiness affords a double-barreled reason for non-payment—a defense based upon the breach of the warranty, express or implied, or as automatic proof that the loss arose from this rather than a specified peril (perils of the sea) insured against. For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause."
>
> *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946.

Turning back to the *Walker* case, *supra*, we find, strangely enough, that the Fifth Circuit itself frowns upon any reference to marine insurance claims as a guide to the nature of the duty imposed upon a shipowner arising out of circumstances such as in the case at bar. The Court states:

> "(5) Nothing in the celebrated dicta of the *Wash Gray*, so heavily relied on by the District Court, is to the contrary. The problem in that case was not the standard of seaworthiness exacted by the law for the protection of life and limb of passengers or crew members or the care and custody and delivery of cargo entrusted to a vessel. Rather, it was whether the damage sustained by the insured vessel was caused by a peril of the sea as defined in a private insurance contract between owner and un-

> derwriters. Complicating that case, too, was the admitted insufficiency—hence, unseaworthiness—of the *Wash Gray* to go outside. Notwithstanding this, the underwriters purposefully issued the insurance with full knowledge of, and acquiescence in, the proposed voyage, and exacted a higher premium therefor. So much is wrapped up in that kind of case, the nature of the assured's warranty of seaworthiness, if any, its extent and duration in point of time, and the like, that it is not safe to conclude that losses from a 'peril of the sea' or those caused by 'unseaworthiness' are always mutually exclusive. *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir. 1957, 242 F.2d 385, 1957 AMC 655; *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946. More important, insurance cases which turn on the law's quest for the contractors' intention are *poor analogies* in assaying the 'public' duties imposed by law on ships and shipowners for the protection of people and property." (Emphasis ours)

Strangely enough, the Court cites the *Tropical Marine Products* case, *supra*, and states that it is a poor analogy, but in the following paragraph uses it in support of what it calls "sea-going *res ipsa loquitur*" in a *death* (as opposed to a hull) claim. Such "circular reasoning" is no different than that with which the Court accused the trial court in the latter's attempted definition of "reasonable fitness." See page 190.

B. The Basis of the Ruling in *Walker v. Harris*

The decision in the *Walker* case, *supra*, hinges principally not upon a finding of unseaworthiness but rather upon the presence or absence of negligence. The court so states as follows:

"(4) The question in this case boils down then to whether winds and seas of the kind actually encountered at this fateful moment were reasonably to be anticipated. On this record there cannot be any doubt."

The Court then relates the substantial and persuasive testimony by expert witnesses and the master of the tug that the "northwester" that caused the casualty was one which could have reasonably been anticipated and provided against. Such consideration can only be referable to traditional concepts of negligence and can have no relation to unseaworthiness. It is true that the Court concludes its opinion by making a finding of negligent unseaworthiness. This was only to resolve any problems as to the right to recover under the Death on the High Seas Act, 46 U.S.C.A. Sec. 761, the survival provisions of the Jones Act, 46 U.S.C.A. Sec. 688, 45 U.S.C.A. Sections 51, 59, or the local Florida Death Act, Fla. Stat. Ann. Sec. 768-01.

C. Condition of the Lifeboat in *Walker* and *Walston*

The Court in *Walker, supra,* states that there is "no difficulty presented as to the proof of unseaworthiness from the inadequate equipment of the lifeboat." While an extensive search was initially made by the Court into the necessity of the tug having a lifeboat under the applicable statutes and Coast Guard regulations, the Court concluded that with or without statutory requirement and wholly independent of Coast Guard regulations:

"• • • no vessel putting to sea in the open waters

> of the Gulf of Mexico on a voyage which will put the ship as much as 12 hours from shore in December is seaworthy unless it has at least one lifeboat suitably equipped."

The foregoing comment was a preface to the portion of the opinion stating that this was not considered to be an intrusion into the legislative domain. Factually, this is a completely different background of a vessel's activity from the one at bar. Here, the vessel inferentially was within three miles of shore. (See footnote 3 to the Court of Appeals' decision stating that there was no evidence that the vessel was beyond a marine league from the shore.) Also, the incident occurred on February 21 rather than mid-December. While the transcript does not contain a notation of the vessel's speed, it is obvious that its position within three miles of shore would have put it no greater than 30 minutes from shore rather than 12 hours, as in the *Walker* case, *supra.*

This factual difference in the location of the respective vessels as it affects the presence or absence of a lifeboat or raft logically precludes any conclusion that there is a conflict between Judge Brown of the Fifth Circuit and Judge Ely of the Ninth Circuit. Judge Ely felt that it would be mere conjecture to assume that the absence of the lifeboat contributed to the sinking of the vessel. (See Circuit Court's Opinion, footnote No. 2.) This affirmance of the decision of the Trial Court should be upheld unless *clearly* erroneous.

D. Petitioner's Other Authority

The petitioner seeks comfort in this Court's denial of

the Petition for Certiorari filed in *Sabine Towing Company v. Brennan*, 72 F.2d 490, 1934 A.M.C. 1122 (Fifth Circuit), stating that the Circuit Court in that case had applied the presumption of unseaworthiness. A careful reading of the decision, however, indicates that it became unnecessary to apply the presumption of unseaworthiness since the evidence indicates *specific* defective conditions of the vessel. The owner, in his defense, had produced evidence of extreme weather conditions at the time of the loss. The Court stated:

> "When, however, the evidence of weather conditions is considered in the light of the whole history of the tug, and of what was done to it by adding weight, and especially when it is considered that no inclining nor stability test was made on it, and the repairs and reconditioning were made without knowledge of or regard to its history of tenderness and crankiness, this weather evidence ceases to be explanatory of the loss as its cause. It becomes merely a condition of it. It serves but as a test of the equipment and preparation of the tug for the duties it must perform, and as proof that its condition as to seaworthiness was not what it ought to have been."

CONCLUSION

The petitioner contends that a conflict exists between *Walker, supra,* and *Walston.* Briefly, these two decisions hold:

(1) *Walker* case—a *finding* of specific negligent unseaworthiness of tug and lifeboat—NO NEED TO APPLY A PRESUMPTION.

(2) *Walston* case—a *finding* of *no* unseaworthiness and *no* negligence—THEREFORE A REFUSAL TO APPLY A PRESUMPTION.

In this case, the Court of Appeals has reaffirmed its definition of and guidelines for the use of the presumption. The decision in *Walker, supra,* is not inconsistent therewith since the presumption was neither needed nor applied. The latter court's comment on the presumption was therefore dicta. In essence, THERE IS NO CONFLICT.

WHEREFORE, respondent prays that the decision of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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